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No. 85-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BOB HESS,

Petitioner,

v.

MARK TREECE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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REPLY BRIEF OF PETITIONER

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Respondent offers no argument or authority to support the proposition that speech concerning public officials loses the protection of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), merely because it is challenged under the banner of intentional infliction of emotional distress, rather than the traditional banner of defamation. The actual malice standard of *New York Times* applies to any claim for damages based upon criticism of official conduct. And the Ar-

kansas Supreme Court committed clear error in failing to recognize that basic principle.[1]

Respondent now attempts to save the judgment by arguing that there was evidence of actual malice under *New York Times* after all. No court or jury has made a finding of actual malice, however, and no court has made a determination that there is sufficient evidence to permit such a finding.[2] In fact, no court or jury has made any finding that Hess' complaints about Treece were even false. The only comment by anyone on that issue has been Justice Purtle's uncontested observation in dissent: "There was no proof that any of [Hess'] complaints about [Treece] was untrue." Petition App. B, at 15a. The record, in fact, establishes unmistakably that the

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[1] As respondent emphasizes, "[t]he Arkansas Supreme Court reviewed the sufficiency of the evidence based on the tort of intentional infliction of emotional distress and not that of defamation." Response to Petition for a Writ of Certiorari ("Response"), at 5. The Arkansas Supreme Court's error was in thinking there was a difference as far as the Constitution is concerned.

[2] Respondent's argument that "[t]he tort of intentional infliction of emotional distress encompasses actual malice as a necessary element," Response, at 8, is based on a misunderstanding of the *New York Times* standard. As this Court has repeatedly emphasized, the *New York Times* standard is not satisfied by proof of malice in the common law sense—i.e., ill will, intent to injure, or bad motives. See discussion and cases cited in the Petition for a Writ of Certiorari, at 14-15. *New York Times* requires proof that the defendant "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose Corporation* v. *Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1965 n. 30 (1984). The officials who received Hess' complaints testified that there was nothing to indicate Hess did not sincerely believe them to be true. R. 436, 551-53, 566, 752.

statements upon which liability was based were true, and that Officer Treece was suspended by the police department for doing precisely what Hess said he was doing.[3]

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[3] Hess' principal complaint was that Treece was working at an off-duty job while on duty. As the Chief of Police testified at trial, after an investigation "it was determined that Officer Treece was working an off-duty job while he was on the payroll for the City of Little Rock and he subsequently was disciplined [suspended] for that." Arkansas Supreme Court Record ("R.") 753. Treece was also disciplined for giving a false statement in the course of the investigation and causing another officer to make a false statement. R. 721, 754, 776-77. The Arkansas Supreme Court's statement that Treece was suspended "primarily for giving a false statement to the investigators and not for working another job while on duty," Pet. App. A, at 6a, is incorrect. The Chief of Police, who imposed the suspension, testified unequivocally that it is "not fair to say" that Treece's false statement was "the main reason" why he was disciplined, and that "the suspension was administered for violating both of the rules [prohibiting leaving a place of duty without authorization and false statements]." R. 776-77. See R. 242-43.

Hess also reported that Treece was at his apartment while on duty. Treece was found to be in violation of department policy and reprimanded for one such incident. R. 429, 438-39, 447, 724-25. An inquiry into another such incident revealed that Treece was at his apartment as Hess reported, but had received clearance from his supervisor. R. 437-38. It was this latter incident that the Arkansas Supreme Court referred to when it said Treece was found "innocent" of this charge. Pet. App. A, at 2a.

Hess told the City Manager that Treece had harassed a Ms. Haston by accusing her and her boyfriend of selling drugs to him. R. 909-10. Ms. Haston testified that Hess' statement that Treece was "harassing" her was false. R. 619-23. As a

In short, the Arkansas courts have upheld an award of $75,000 in compensatory and punitive damages based upon truthful criticism of a public official. They have imposed liability without ever having assessed the evidence under the actual malice standard that the Constitution demands.

That the Arkansas courts' error is so clear should not deter this Court from correcting it. The right of the individual to criticize official conduct is the bedrock of our democracy, and this Court's unwavering protection of that right is the surest guarantee that it will be preserved.

This Court should grant the petition, and remand the case to the Arkansas Supreme Court for an assessment of the evidence of actual malice under *New York Times*. That action will reaffirm the principle

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matter of law, however, Hess' characterization of Treece's conduct as "harassment" was a rhetorical statement of opinion, not a "false" statement of fact. *See, e.g., Old Dominion Branch No. 496* v. *Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970). The underlying facts reported by Hess were true. Treece acknowledged that he told Ms. Haston he had information she and her boyfriend had been supplying drugs to Hess, and that she was upset at that accusation. R. 715. (Contrary to respondent's suggestion, Ms. Haston did not testify that any of Hess' other complaints were "false." She did testify that "as far as I know [the complaints about Treece's whereabouts] weren't valid," R. 621, but as noted above those complaints were in fact true.)

Hess' initial complaint was directed at another officer, Wheat, for charging dinners at a local country club to Hess' account, and wrecking an automobile that belonged to Hess. R. 439-40, 568, 749, 774. That complaint was also determined to be true, and Wheat was suspended as a result. R. 440, 750.

that criticism of official conduct is protected by the Constitution, regardless of the legal theory or label under which it is challenged.

Respectfully submitted,

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